BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

In the Matter of	:	
	:	Dockets OST-97-2881
COMPUTER RESERVATIONS SYSTEM	:	OST-97-3014
(CRS) REGULATIONS	:	OST-98-4775
	:	OST-99-5888

COMMENTS OF CONTINENTAL AIRLINES, INC.

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Introduction

Airline distribution is on the brink of a revolution that can benefit consumers, airlines, travel agents and competitive distribution channels. Refraining from regulation of Internet distribution channels and modifying current Computer Reservations System ("CRS") regulations to facilitate the transition to a competitive airline distribution marketplace by reducing the number of rules and modifying rules to facilitate the transition will produce substantial benefits which can be achieved only in a marketplace free of the artificial distortions caused by airline and travel agency dependence on CRS systems. Continental[1] commends the

[1] Common names of companies are used.

Department for proposing streamlined CRS rules which respond to these dramatic changes and recognize that allowing the marketplace to discipline prices and services for airlines and subscribers benefits competition and consumers. As the Notice of Proposed Rulemaking ("NPRM") recognizes, the growing use of the Internet for airline distribution "has given airlines and other travel suppliers new ways to obtain bookings and inform consumers of their services and to do so at significantly lower cost."[2] Within the next five years, competition for the traditional CRSs will be able to replace government regulation to prevent biased displays and other abuses which the CRS rules are designed to address. Currently, however, travel agents still issue over 90% of their international tickets and 80% of their domestic tickets using the same four CRSs whose practices prompted the rules (67 Fed. Reg. at 6370), and network airlines and travel agents are forced to rely on those same four CRSs to function effectively. Although Continental believes that CRS regulation will not be required in the future, limited CRS regulation is still necessary for a transitional period.

During the transition to CRS deregulation, Internet distribution channels, which provide competition for the CRS systems, must remain free of any regulation. As a first step towards CRS deregulation, the Department should eliminate all but a necessary few CRS regulations. Provisions that harm competition and consumers by preventing airlines from selecting distribution channels based on price and

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[2] 67 Fed. Reg. at 69366, 69373 (November 15, 2002).

service and discourage travel agents from using multiple distribution channels should be eliminated. At the same time, the Department must prohibit systems from using contractual provisions that have the same effect as the discarded rules or otherwise restrict airlines' ability to negotiate fees, terms or conditions of participation in systems.

The streamlined, transitional CRS rules should:

- Apply equally to all CRSs regardless of ownership, as proposed;
- Outlaw contractual provisions and practices that unreasonably restrict carrier or subscriber flexibility and bargaining power;
- Continue to require nondiscriminatory MIDT sales without proposed restrictions or eliminate all rules on MIDT sales;
- Continue to prohibit screen bias, bar airlines from providing biased software to travel agents and limit international codeshare displays to one listing per partner; and
- Retain the prohibition on discriminatory booking fees if the mandatory participation rule is not eliminated.

Continental states as follows in support of its position:

I. CRS Rules Should Be Modified and Readopted to Facilitate the Ongoing Transition to a Competitive Airline Distribution Marketplace, and the Rules Should Sunset Within Five Years, When the Transition Is Complete

The marketplace will be able to replace government regulation entirely to address competitive abuses the CRS rules were intended to resolve as soon as CRSs can no longer dictate terms to airlines and travel agents. The rapid growth of Internet and other distribution channels as alternatives to systems is reducing the need for CRS rules. Nevertheless, for the short term, the four systems used in the U.S. will still have the means to distort airline competition, provide inaccurate or

misleading information through travel agents to consumers and impose exorbitantly high fees on airlines. Since competition is a better antidote to CRS abuses than regulation, however, the Department should maintain only those CRS rules necessary to protect competition and consumers, and the streamlined CRS rules should contain a specific sunset in five years. Two years before the rules sunset, the Department should study changes in the airline distribution marketplace to determine whether alternative distribution channels are able to compete effectively with CRSs. If they are, CRS rules should be eliminated immediately at that time.

Reduction in the airline ownership of systems and the advent of alternative distribution channels have not yet eliminated the airlines' need to participate in all systems, the travel agencies' dependency on systems or the damaging effects of bias in CRSs. While CRS competition has improved since the CRS rules were enacted, the CRS industry in the U.S. is still an oligopoly of four firms, each of which still provides access to a large, discrete group of travel agents. Therefore, each network airline must participate in each CRS, and travel agencies remain captive to CRSs. For a limited time, therefore, Continental believes there is a need to retain those CRS rules that protect consumers and competition from system abuses.

The Department has tentatively proposed no sunset provision for the CRS rules, but Continental urges the Department to sunset the rules in five years. Because the rules should only be retained until the marketplace is able to discipline system prices, terms and conditions, the Department should couple the five-year sunset provision with a study of changes in the airline distribution marketplace two

years prior to sunset to determine whether alternative distribution channels have become, or are becoming, effective competitors for CRSs. If the airline distribution marketplace has become fully competitive in three years, CRS rules could be eliminated then.

II. The Department Wisely Excludes the Internet from CRS Regulation

The Department has wisely excluded all Internet distribution channels from its proposed CRS rules.[3] Traditional systems need competition, which today is possible only through the continued growth and evolution of the Internet and other alternative distribution channels providing, potentially-effective competition for CRSs. The CRS rules were never intended to cover the Internet, where consumers can obtain maximum benefits of competition directly from a wide variety of sources and reject or accept available online sources with the click of a mouse. Market forces should be allowed to continue to propel the dynamic and procompetitive development of the Internet without regulation. Without unfettered competition from the Internet, the four systems will continue to impose booking and other fees that are even more grossly disproportionate to the economic value of their systems and restrict the ability of airlines and consumers to maximize the number, variety and quality of distribution channels available to them.

An essential corollary to the Department's exclusion of the Internet from CRS regulation is the Department's proposal to prohibit tying access to traditional travel

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[3] See 67 Fed. Reg. at 69410.

agency services with access to a system's Internet services and to prohibit tying CRS services to requirements that carriers display all their fares in any CRS. Without the Department's proposed ban on tying airline participation in a system (as used by brick and mortar travel agencies) with system access to Internet services and fares, systems will continue to use contract provisions that require an airline to allow its services to be booked by every user of the system, including traditional and Internet travel sites that use the system and tie CRS participation to requirements that all of a carrier's fares be offered through CRSs. Such requirements would deny airlines the freedom other retailers and vendors enjoy to select distribution channels that are most attractive on the basis of cost, quality of service or other factors. A ban on tying will enable airlines to decide whether particular access is desirable and provide airlines the ability to bargain over the fees and terms for such access. An anti-tying rule would also advance the desirable goal of enabling market forces to discipline the terms and level of airline participation in the systems, which should result in more competition and lower fees.

The Department has said that Continental is "urging us to regulate Internet operations in some respects,"[4] but Continental opposes all regulation of the Internet. Although Continental initially supported an Internet bias rule before the profound effects of the Internet became apparent, Continental rejected such a rule

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[4] See 67 Fed. Reg. at 69410.

several years ago as unnecessary, unworkable and undesirable.[5] The rapid growth of Internet travel services, their developmental state and their potential to benefit consumers and competition are inconsistent with regulation. Moreover, regulation of Internet travel sites would be contrary to the consistent federal policy of leaving other Internet providers free of regulation and would stifle both the only competition to traditional CRSs and the continued innovation and growth of Internet distribution channels.

In response to specific issues raised by the Department about regulation of Internet distribution channels, Continental provides the following additional comments:

A. Rules are not needed to prevent consumers from being harmed by websites offering potentially inaccurate or biased information

No rules are needed to protect consumers from an Internet travel agency's inaccurate or biased information. Consumers have the ability to check and compare such information on their own. Moreover, as noted above, unlike travel agents, which have only four potential information sources and "have typically relied entirely or predominately on just one system" (67 Fed. Reg. at 69379), consumers have numerous sources of fare and schedule information, at no cost, and the ability to accept or reject instantly the information provided by an Internet travel site. Consumers accessing Internet sites can and do evaluate the information available

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[5] See Continental's Supplemental Reply Comments, filed October 23, 2000.

from each site and, with the click of a mouse, select alternative sources for information. In contrast, consumers using traditional travel agents who in turn rely on CRSs believe they are securing information from a neutral source and cannot evaluate the information being provided to their travel agents.

No other federal agency has regulated Internet distribution of goods and services. Moreover, Congress has rejected attempts to ban Internet gambling and has failed to ban unlicensed gun dealers from selling guns over the Internet.[6] The Department should not even consider regulation of Internet sales of a clearly beneficial service such as air transportation.

B. The Department should not adopt rules governing websites like Orbitz and Hotwire that are owned by several airlines

As explained above, Continental opposes regulation of any Internet distribution channel. If the Department nevertheless decides to regulate the Internet, there is no reason to single out Orbitz, Hotwire and other websites with multiple airline investors for special rules that do not apply to other Internet travel websites. Proponents of special rules for Orbitz and Hotwire, such as Southwest, want to use this rulemaking to reverse the procompetitive and proconsumer effects of these websites on air travel and to reduce effective competition for their own distribution channels.

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[6] See "House Rejects Bill Limiting Web Gambling," Washington Post, July 18, 2000, at A1.

As the Department's Inspector General concluded after a thorough review, "Orbitz has not deviated from its commitment to an unbiased display of airfares and services."[7] The Department was correct to reject transparent attempts to shackle Orbitz and Hotwire with special rules to hinder the development of these distribution channels to compete effectively with traditional CRSs and individual airline websites.

C. On-line travel agencies are not entitled to special protection from allegedly discriminatory treatment on such matters as commission rates

The Interactive Travel Services Association, the trade association for Internet travel agencies, seeks rules that would preclude airlines from treating online agencies differently from traditional agencies. Continental agrees with the Department that it is unwise to require airlines to treat all types of travel agencies the same. As the Department recognizes, "an airline's decision to provide higher commissions or better treatment to one type of distribution channel (or some but not all firms within the same channel) would not ordinarily conflict with antitrust principles." (67 Fed. Reg. at 69413) Moreover, requiring airlines to treat all travel

[7] OIG Comments on DOT Study of Air Travel Services, Office of the Secretary, CC-2002-061, December 13, 2002, at 17.

agencies the same is at odds "with the industry's established distribution practices" under which "airlines have always given some types of travel agencies benefits not given to others." (Id.) The marketplace, rather than regulation, should continue to determine the relationship between airlines and on-line travel agents.

D. The Department should not force airlines to sell the discount fares offered on airline websites through all travel agencies

The Department should refrain from regulating discount fare offerings on airline websites by requiring such fares to be available through all travel agents. Airlines, like all other retailers and vendors, should be allowed to offer their products through whatever distribution channels they choose, including offering consumers discount fares over branded or other Internet websites. As the Department has said, the antitrust laws and not rulemaking are "the most effective method for addressing" any unfair method of competition in distribution of fares.[8] That view is consistent with the government's general "market-oriented approach to electronic commerce" (see The White House, A Framework for Global Electronic Commerce, July 1, 1997 at 3) and the lack of federal rules requiring other online or brick-and-mortar retailers or vendors to disclose all prices through all distribution channels.

[8] 67 Fed. Reg. at 69413.

E. The Department should bar systems from requiring airlines to make their services saleable by all system users selling tickets over the Internet

Similarly, as discussed above, systems should not be able to force airlines to sell their services through all system users that sell tickets over the Internet. As the Department recognizes, 49 U.S.C. § 41712 does not authorize the Department "to dictate to the airlines how they will distribute their tickets, unless they are engaged in practices that violate the antitrust laws or principles," and an airline's decision to offer its E-Fares to one online agency but not another "would not necessarily violate the antitrust laws or antitrust principles." (67 Fed. Reg. at 69414) As the Department has said previously, "We are unwilling to interfere with airline choices on distribution methods as long as the carriers neither violate antitrust law principles nor otherwise harm the public. The statute directs us to foster competition in the airline industry, and more efficient distribution methods should promote airline competition."[9] Like other vendors and retailers, airlines should be free to select low cost, high visibility and productive distribution channels without being compelled to use non-productive or higher cost Internet or other channels.

[9] Letter from Charles A. Hunnicutt to Bruce Bishins, President and CEO, United States Travel Agent Registry, Sept. 27, 1996, at 3.

F. The Department should clarify the language excluding Internet sites from the CRS rules

As currently defined, a "system" is "a computerized reservations system offered by a carrier or its affiliate to subscribers for use in the United States that contains information about schedules, fares, rules or availability of other carriers and provides subscribers with the ability to make reservations and to issue tickets, if it charges any other carrier a fee for system services." (14 C.F.R. § 255.3) To avoid any misinterpretation that suggests this definition includes Internet travel sites (which contain information about schedules, fares, rules or availability of carriers and provide subscribers, as well as consumers, with the ability to make reservations and to issue tickets), the Department should add a sentence to the definition expressly excluding Internet travel agents and other Internet distribution channels from the system definition. The "Applicability" section (14 C.F.R. § 255.2) should also state that Internet distribution channels (that is, online travel sites primarily dedicated to providing travel services to consumers) are not subject to the CRS rules.

III. The CRS Rules Must Apply to all Systems Equally

Any transitional CRS rules must apply to all four systems used in the United States equally, regardless of the ownership of those systems. The Department recognizes that "As long as the systems have market power, they will continue to charge supracompetitive booking fees that necessarily increase airline costs and fares paid by passengers." (67 Fed. Reg. at 69408) Two of these systems, including Sabre, the largest CRS in the world, have no airline ownership, although all four

systems remain at least partly marketed or owned by airlines.[10] Network airlines today have no real choice but to use all four CRSs, regardless of ownership. Thus, for example, Sabre has been able to raise the price it charges airlines to book each ticket by three percent and to maintain its high profit margins, even as airfares fall and airlines struggle for survival. ("As Big Airlines Struggle, Computer Booking System Prospers," The New York Times, February 11, 2003 (online edition)) It would make no sense to apply the CRS rules to other systems and allow the world's largest CRS, which brags that it has almost half of all U.S. and Canada travel-agency CRS bookings,[11] to dominate the CRS marketplace, thwart competition and discourage development of cheaper services and better technology without any regulation.

The Department has asked parties "whether a non-airline system, despite the lack of airline control, might use its power to distort airline competition or mislead consumers and engage in practices that would unreasonably restrict the ability of airlines and travel agencies to use alternatives to the systems, thereby increasing airline costs (and thus the fares paid by customers)." (67 Fed. Reg. at 69375) Non-airline systems are doing so today through productivity pricing and other provisions that discourage travel agencies from direct connections with airlines and other

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[10] Worldspan, which is now owned by American, Delta and Northwest, is being sold by its three airline investors. Thus, Amadeus will soon be the only CRS with airline ownership.

[11] See Sabre 2000 Summary Annual Report, Business Overview: Travel Agency Channel, at 1.

alternatives to systems. The NPRM shows that Sabre is using contract clauses that prevent airlines from encouraging travel agencies to use less expensive and more efficient distribution channels. (See 67 Fed. Reg. at 69392-93) Sabre is also suing participating carriers for breach of those terms (see, e.g., Sabre v. Air Canada, 2002 U.S. Dist. Lexis 23697 (N.D. Tex. 2002)) and to enforce contract provisions that allegedly require participating airlines to offer their webfares through Sabre. (See American v. FareChase, Case No. 67-194022-02, 67th Judicial District, Texas, filed June 24, 2002) Without question, any readopted CRS rules should apply to all systems, whether owned by airlines or not.

IV. To Facilitate the Transition, the Department Should Outlaw Contractual Provisions that Unreasonably Restrict Carrier or Subscriber Flexibility and Bargaining Power

A. The Department Should Adopt the Anti-Tying Rule Proposed as Section 255.6(e), With Modification, and Similarly Modify the Anti- Parity Rule in Section 255.6(d)

The Department should add its proposed new Section 255.6(e), which would prohibit a system (1) from barring an airline from discriminating against travel agencies using the system if the alleged discrimination results because the system has higher booking fees and poorer service than other systems, and (2) from requiring any airline as a condition for participation to provide that system with fares that the airline has chosen not to sell through travel agencies or the systems. Continental endorses both concepts, and urges the Department to modify the language proposed so that the new provision applies whenever a system requires or

imposes higher fees of any kind, not just booking fees. The prohibitions should apply equally to current and new CRS contracts.

Especially if the Department abolishes the mandatory participation rule, Continental also believes the exception for airlines that own or market a competing system should be deleted from the proposed language in Section 255.6(e), since such an exception would be inconsistent with elimination of mandatory participation and the Department's objective of allowing market forces to discipline the prices and terms which are offered to airlines for CRS services.

As discussed above in Part III, systems are imposing contract terms on airlines that unreasonably restrict airline choices on how to distribute their services. For example, Sabre's contract with participating carriers purports to require them to make all of their air fares available in Sabre's CRS, and Sabre has sued American for not offering its webfares through Sabre. (See Case No. 67-194022-02, 67th Judicial District, Texas, filed on June 24, 2002) The new rules should prevent CRSs from using such contract provisions. It is imperative that airlines remain free "to create ways of bypassing the systems when doing so is more cost-effective and likely to establish competitive discipline for systems' prices and terms for participation." (67 Fed. Reg. at 69393) Airlines should also have the ability to encourage subscribers "to use a system or similar electronic service that provides better service or charges lower fees." (Id.) Because airlines should be free to determine how to distribute their services and fares, and to do so in the most cost-effective manner, Section 255.6(e) should allow airlines to discriminate among

systems if any of a system's fees, not just its booking fees, are higher than the fees charged by other systems. The freedom of all airlines to select the most cost-efficient and effective distribution should override any concerns about system owner and marketer participation levels in other systems.

With Continental's proposed changes, new Section 255.6(e) would read as follows:

> No system shall, by enforcing a term in a contract with a participating carrier or through other means, require a carrier, as a condition of system participation, to provide such system access to any particular alternative distribution channel, fare offered exclusively through alternative distribution channel or particular systems, or any other services or benefits, including without limitation, frequent flyer or similar rewards, waivers or modifications to any restrictions otherwise imposed on particular fares, and other services or features available only through particular channels of distribution.

For similar reasons, the Department should rewrite the parity rule in Section 255.6(d), to eliminate the exception permitting enforcement of parity clauses against airline owners and marketers. Although no party has asked the Department to reexamine the rule prohibiting the enforcement of parity clauses, retaining an exception from that rule which allows enforcement of parity clauses against airline owners and marketers of systems would be contrary to the policy reasons for eliminating the mandatory participation rule and inconsistent with the Department's view that airlines "must be able to choose whether they will participate in a system and at what level." (67 Fed. Reg. at 69392) Other

remaining exceptions or special treatment for airline owners or marketers should also be eliminated if the Department abolishes the mandatory participation rule.[12]

B. Productivity Pricing Should Be Outlawed

The Department is correct to propose banning productivity pricing and other financial incentives for subscribers to use a particular system because such incentives frustrate the "goal of giving travel agencies more leeway to use multiple systems and databases, including the Internet." (67 Fed. Reg. at 69409) This new prohibition should also bar systems from financing hardware used by travel agents because such financing reinforces a subscriber's dependence on its primary system the same way productivity pricing does and prevents agencies from using multiple systems and databases.

As the Department recognizes, productivity pricing "operates as the equivalent of the minimum use clauses that were prohibited when [the Department] last reexamined our rules." Rather than using such clauses to make more efficient use of its CRS equipment, the systems "have been using productivity pricing to encourage travel agencies to use one system for all or almost all of their bookings." (67 Fed. Reg. at 69408) This increases the dependency of agents on the system they

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[12] Such sections include: Section 255.5(b) related to defaults and service enhancements; Section 255.8, which bars system owners from requiring subscribers to use the owners' system for sales. These prohibitions should apply generally to participating carriers. Additionally, all airlines should be barred from requiring a subscriber to use a particular CRS system for any sale.

use, thereby unreasonably restricting travel agency use of multiple systems. (See id.)

The Department is correct that the real victims of productivity pricing are consumers. By discouraging travel agents from using alternative distribution channels, productivity pricing prevents agents from searching all channels to secure the best flights and fares for their customers. As the Department points out, "Productivity pricing may keep travel agents from serving their customers properly by deterring travel agents from using the Internet to book E-fares, which are normally not available through the systems used by travel agents." (Id.) This is so because by using an online travel channel for bookings the agent risks not meeting the minimum monthly booking quota set by its productivity pricing provision.

In addition to consumers, airlines also suffer from productivity pricing because the practice makes it impossible for them to persuade travel agencies to bypass the systems used by the travel agent to make "direct connect" bookings with the airlines using more cost effective electronic means to communicate with agents. This is a very real problem for Continental, which is investing resources and funds in developing a direct connect capability which will reduce travel agent dependence on systems by allowing them to access Continental's internal reservations system directly. Eliminating or restricting productivity pricing and similar incentives provided by systems will reduce travel agency reluctance to use the technologically superior and cost-efficient alternatives being developed by Continental and others.

C. The Department Should Adopt Its Other Proposals on Travel Agent Contracts

To facilitate the transition to a more competitive marketplace, Continental also strongly supports the Department's other proposals to reform subscriber contract provisions and urges the Department to adopt one year as the maximum permissible term for a subscriber contract. Other technologies (e.g., cell phones and on-line Internet services) are offered to customers on a one-year minimum contract basis, and 12 months provides sufficient time for amortization of the costs of providing services and equipment. If a longer contract is permitted under the revised CRS rules, the Department should adopt the European Commission's rule allowing subscribers to terminate a CRS contract without penalty with three months' notice once the first year of the contract has passed. As the Department recognizes, travel agents are extremely dependent on the four CRS systems. According to one survey, "travel agencies made 93% of their domestic airline bookings and 81% of their international airline bookings through a system in 1999."[13] Restrictive contract provisions unduly limit competition in the CRS industry, and long contracts lock travel agents into their co-dependent relationships with a single CRS vendor. Adopting a one-year maximum contract term would further the Department's goal of enabling travel agencies to use multiple systems

[13] U.S. Travel Agency Survey 2000, Travel Weekly, August 24, 2000, at 133.

and databases and to switch systems, which in turn promotes competition and will help expedite the transition to deregulation of CRSs.

The Department's current bans on rollover clauses and minimum use requirements must be maintained. Continental also strongly supports the Department's proposal to bar systems from demanding liquidated damages that would reflect booking fees allegedly lost by the system due to a subscriber's use of a different system.

The current five-year rule has thwarted Continental and other airlines from offering better and cheaper technology to travel agents and has entrenched the dependency of each travel agent on its principal system. Reducing this dependency and facilitating subscriber flexibility to take advantage of newer and less costly technologies by opting out of the subscriber's current system or using multiple systems would constitute a significant step forward as part of the transition to a competitive marketplace.

D. The Department Should Strengthen the Third-Party Hardware Rules by Eliminating the Exception for System-Owned Hardware

Continental agrees with the Department that the third-party hardware rules have been somewhat successful in enabling travel agencies to use several systems and establish direct links with internal airline reservations systems and other databases. Those rules allow travel agencies to secure their own equipment for system access and to access any system or database with airline information from the terminals used by the agency unless a system owns the equipment.

Nevertheless, as the Department recognizes, systems have adopted contract practices and financial incentives which effectively prevent travel agencies from using multiple systems and databases because they deter travel agencies from purchasing their own equipment. In other words, as other parties have suggested, the exception for system-owned equipment has effectively nullified the third-party hardware rule.

Just as the Department should prohibit systems from financing hardware used by travel agents (see Part B above), it should also eliminate the exception to the third-party hardware rules for system-owned equipment. Like productivity pricing, the current third-party hardware exception locks travel agents into a particular system, increases the co-dependency between subscribers and that system and discourages the agents' use of alternative means of selecting options for its customers.

V. The Department Should Either Retain the MIDT Sales Rule as Is or Eliminate the MIDT Rule Entirely

Rather than imposing new rules on data sales by CRSs, the Department should either retain the current MIDT rule as is or eliminate the MIDT rule altogether. Although the Department acknowledges that "data that can be derived from bookings made through each system are invaluable for marketing purposes,"[14] the proposed rule would ban release of Marketing Information Data Tapes ("MIDT")

[14] 67 Fed. Reg. at 69401.

data related to individual travel agents (unless the carrier buying the data participates in the segment) and to airlines that have not agreed to release of their data. Alternatively, the Department suggests a time-lag for release of the data.[15] These proposed restrictions on MIDT would harm competition. The Department's proposals would adversely affect consumers, travel agents and carriers. As a result, Continental urges the Department to retain § 255.10 as is or to eliminate all regulation of data sales by CRSs.

Contrary to statements contained in the NPRM about the content of MIDT (see, e.g., 67 Fed. Reg. at 69402), the marketing and booking data sold by CRSs today contain no fare information at all. While booking class is included on MIDT, the tapes exclude the fare amount as well as the fare basis. Similarly, MIDT data do not identify individual passengers. Passenger names and Passenger Name Record ("PNR") locators are excluded from the tapes, and the four CRSs either scramble the data or suppress PNR locators so there is no way MIDT can be used by an airline to access customer records of another airline.

Airlines of all kinds use MIDT data for legitimate business purposes, and those uses promote competition. As the Department recognized in the NPRM,

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[15] The Department's proposed MIDT rule is more restrictive than the rule proposed by ACAA, which would prohibit only sale of MIDT data related to airlines that do not consent to release of such data. Other commenters seek to prohibit release of MIDT to any airlines. 67 Fed. Reg. at 69402.

"Airlines use the data for marketing research and route development purposes and to make decisions on pricing and revenue management." (67 Fed. Reg. at 69402) There is also no basis for the Department's statement that "the availability of [MIDT] data has adversely affected airline competition or interfered with travel agencies' ability to book the services that best meet their customers' needs." (Id.) In fact, it is the restriction of MIDT sales, not the availability of MIDT data, which would harm airlines, agencies and consumers.

Allowing participating carriers to prevent inclusion of their data in MIDT would erode the value of MIDT. Without MIDT on all airlines that participate in CRSs, schedule planning by airlines would be far more difficult. Improving market shares in existing markets and making decisions about entry into new markets would become extremely difficult. The lack of MIDT would force airlines to be more cautious about entering new markets, and this more conservative approach to expanding services would in turn hurt the consumer.

Prohibiting sale of MIDT at the individual agency level, as the Department proposes, would hurt travel agents by depriving airlines of the information they need to measure accurately an agency's performance relative to other travel agents in the same market and calculate appropriate agency commissions. Without the individual agency data, agency commissions would likely decrease and airlines would not be able to determine where and how to target marketing activities to agencies.

Eliminating all regulation of data sales by CRSs would eliminate the requirement that CRSs provide such data allow the marketplace to determine what data will be provided, and move one step further toward deregulation of CRSs.

VI. During the Transition, the Anti-Bias Rules in Section 255.4 Should Be Maintained, Airlines Should Be Prohibited from Providing Biased Software to Travel Agents and the Department Should Adopt Continental's Proposal on Display of Codeshare Flights

Continental agrees with the Department that the anti-display bias rule in Section 255.4 should be maintained and expanded to prohibit any airline from providing software to travel agencies that would bias the display in favor of that airline. Continental has long been a proponent of a general rule prohibiting airline distribution of biasing software.[16] As the Department recognizes,

> We prohibit the systems from biasing their displays because bias causes consumer harm and hinders rival airlines from competing on the basis of fares and service quality. There is little difference between the bias incorporated in system displays and software distributed by the owner airline that enables travel agencies to create displays biased in favor of that airline.

(67 Fed. Reg. at 69397) The same is true regardless of whether the airline distributing bias is a system owner or not.

Continental also urges the Department to strengthen the display rules by limiting listing of international codeshare flights to one display per partner. The current CRS rules do not limit the number of times codeshare alliance partners can display a single itinerary. Unlimited multiple listings of itineraries can lead to

screen clutter and remove alternative flights from the view of travel agents and consumers. Limiting each codeshare partner to one listing per itinerary, as Continental recommends, would reduce screen clutter. Continental's proposal for codeshare displays provides more potential price points for consumers by allowing each codesharing airline to list its flights and fares once for each international itinerary. In contrast, American's one display per codeshare flight or the European Union's two displays proposals would limit the number of fares offered. American's one display proposal should be rejected because it eliminates the benefits of codesharing to airline partners and consumers and is workable only where airlines have antitrust immunity to establish a single level of fares applicable to each itinerary.

VII. If the Mandatory Participation Rule Is Maintained, the Rule on Prohibiting Discriminatory Booking Fees Must Also Be Maintained

If the Department retains the mandatory participation rule, it should also maintain the prohibition on discriminatory booking fees. While Continental is not currently subject to the mandatory participation rule, Continental recognizes that the prohibition on discriminatory booking fees must be maintained to curb pricing abuses as long as some airlines (that is, system owners and/or marketers) are forced to participate in all systems and have no leverage over fees. If and when the mandatory participation rule is removed and the airline distribution marketplace

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(…continued)

[16] See Continental Comments in OST-97-2881, dated December 9, 1997, at 4.

becomes effectively competitive, all airlines will be able to negotiate freely with systems over prices, as well as terms and conditions, and to decide whether to participate in each system. Until that time, however, the marketplace will not be in a position to discipline booking fees, and the prohibition on discriminatory fees should be maintained if mandatory participation rules are retained.

VIII. To Ensure An Effective Transition to a Competitive, Deregulated Airline Distribution Marketplace, the Department Must Enforce the Transitional Rules

Effective enforcement of rules facilitating the transition to a competitive airline distribution marketplace is critical to deregulation of CRSs. If the transitional CRS rules are to meet the goal of ensuring competition and deregulating CRSs, they must be enforced, and added staff resources should enable the Department to resolve complaints more expeditiously than in the past. Equally welcome is the Department's renewed commitment to enforce the CRS rules "vigorously in the future." Where violations are found, penalties should be imposed to deter similar illegal activity.

The NPRM recognizes the importance of enabling "airlines to use alternatives to the systems so that market forces may discipline the prices and terms offered" and the danger that in the absence of any rules systems "might impose requirements on participating airlines that would further limit the airlines' ability to choose whether to participate in a system and at what level." (67 Fed. Reg. at 69380, 69392) Similarly, the Department knows that "systems continue to use contract terms that limit the travel agencies' ability to switch systems or use

multiple systems." (Id. at 69405) The Department's enforcement staff must monitor system contract practices to ensure that systems do not try to re-impose unreasonable restrictions on the flexibility and bargaining position of participating carriers or subscribers by contract, perpetuating the problems which required the imposition of CRS regulations in the first place.

As the Department eliminates portions of the current CRS rules and allows market forces to discipline CRS prices and services, the Department must also step up its monitoring and enforcement of system contract practices to expedite the transition to a fully competitive airline distribution marketplace.

Conclusion

Continental favors complete CRS deregulation in five years or sooner if market forces become strong enough to discipline the practices of systems. In the meantime, the Department should readopt streamlined CRS rules on a transitional basis with a five-year sunset provision, apply those rules equally to all systems regardless of ownership and leave Internet distribution channels free of regulation so they can grow and provide competitive alternatives to the traditional CRSs. As early as two years before the scheduled sunset, the Department should study changes in the airline distribution marketplace to determine whether alternative

distribution channels can compete effectively with CRSs and, if they can, to terminate CRS regulations at that time.

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